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October 30, 2008

Via Federal Express
Catherine O'Hagan Wolfe, Clerk of Court
U.S. Court of Appeals for the Second Circuit
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *In re Assicurazioni Generali*, Nos. 05-5602, et al.

Dear Ms. O'Hagan:

The United States of America respectfully submits this letter brief in response to the Court's August 1, 2008 letter to Secretary of State Condoleezza Rice. In its letter, the Court requested the Government's views on whether adjudication of the claims in *In re Assicurazioni Generali*, Nos. 05-5602, et al., "would conflict with the foreign policy of the United States."

It has been and continues to be the foreign policy of the United States that the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be regarded as the exclusive forum and remedy for claims within its purview. The fact that ICHEIC has now concluded its operations does not alter the foreign policy of the United States. Claims against defendant Assicurazioni Generali ("Generali"), one of the original ICHEIC companies and an active participant in its operations, fall within the category United States policy seeks to address.

The United States takes no position on whether plaintiffs' claims are preempted by its foreign policy in light of *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), except to the extent that these claims arise under state statutes such as the California Holocaust Victims

Insurance Relief Act (HVIRA), which, as the Supreme Court held in *Garamendi,* impermissibly impede the conduct of foreign policy and are thus preempted.

I. The Foreign Policy of the United States Has Been That ICHEIC Should Be Regarded As the Exclusive Forum and Remedy For Claims Within Its Purview.

A. The ICHEIC Process.

The United States Government has long been involved in efforts to resolve claims arising out of Nazi-era harms, and obtaining reparations for these harms was a principal object of post-war Allied diplomacy. *See generally Garamendi*, 539 U.S. at 401-408. Although restitution laws enacted by the West German Government provided compensation to many victims, they also left out many claimants and certain types of claims.

In 1998, a number of insurance companies jointly agreed with U.S. state insurance regulators and Jewish and Holocaust survivor organizations to create ICHEIC. Their aim was to establish "a just process . . . that will expeditiously address the issue of unpaid insurance policies issued to victims of the Holocaust." Velie Dec., Exh. A ¶ 1, *In re Assicurazioni Generali*, No. MDL 1374 (M21-89) (S.D.N.Y. filed May 25, 2001).

Generali was one of ICHEIC's founding members and participated actively in its operations throughout the life of the organization. The company contributed $100 million to ICHEIC's overall settlement amount and also made its records available to ICHEIC, enabling researchers to match claimants to Generali policies even when the claimants were unaware or unsure that they were beneficiaries of a Generali policy.[1]

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[1] In the ICHEIC process as a whole, ICHEIC participating companies made 7,747 monetary offers to claimants who did not initially know the name of the insurance company that had issued their policy. Lawrence S. Eagleburger & M. Diane Koken *with* Catherine Lillie, Int'l Comm'n on Holocaust Era Ins. Claims, *Finding Claimants and Paying Them: The Creation and*

From ICHEIC's inception, the United States has participated in the organization as an observer and has sought to support its efforts. In dealing with Holocaust-era claims, the United States has followed a policy of supporting non-adversarial mechanisms of resolving such claims as opposed to litigation. Such mechanisms, the United States believes, provide benefits to more victims, and do so faster and with less uncertainty, than does litigation. Non-adversarial mechanisms thus facilitate the two primary goals of U.S. policy in this area—justice and urgency.

Consistent with this policy, the United States has publicly recognized the importance of Generali and other companies' voluntary participation in ICHEIC. As Stuart Eizenstat[2] explained in congressional testimony in 2000, the Executive Branch

> commend[s] the five European insurance companies that have joined [ICHEIC] and strongly encourage[s] all insurers that issued policies during the Holocaust era * * * to join [ICHEIC] and participate fully in its program * * * *
>
> This is the best and most expeditious vehicle for resolving insurance claims from this period. And we support giving those companies who do join ICHEIC and cooperate with it, safe haven from sanctions, subpoenas and hearings in the United States relative to the Holocaust period.

The Legacies of the Holocaust, *Hearing Before the S. Comm. on Foreign Relations*, 106th Cong. 16 (2000) [hereinafter Eizenstat Senate Testimony].

Workings of the International Commission on Holocaust Era Insurance Claims 49 (2007), *available at* http://www.icheic.org/pdf/ICHEIC%20Legacy%20Document.pdf. By way of comparison, the ICHEIC companies made offers on 5,448 claims in which the claimant knew the name of the insurer. *Id.*

[2] As the Under Secretary of State and later Deputy Treasury Secretary and Special Representative of the President and Secretary of State on Holocaust Issues, Eizenstat was the chief American negotiator on Holocaust issues.

B. The Executive Agreements.

While ICHEIC was being created and beginning its work, the United States was involved in facilitating complicated negotiations among European governments and companies, survivor groups, and claimants' representatives. Those negotiations were conducted against the backdrop of numerous class-action lawsuits filed in United States courts following German reunification.

The negotiations resulted in the signing of an executive agreement with Germany, and a joint statement by all the participants in the negotiations, that recognized the establishment of a German foundation funded with 10 billion DM. *Garamendi*, 539 U.S. at 405. The German government and German companies contributed to a fund that would be used to make payments to individuals who had suffered at the hands of German companies during the Nazi era, including those with unpaid insurance policies. *Id.* at 406-07; *see also* Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-F.R.G., July 17, 2000, 39 I.L.M. 1298 (2000) [hereinafter German Foundation Agreement]. Germany also agreed that, insofar as insurance claims were concerned, the Foundation would process claims according to ICHEIC procedures. German Foundation Agreement, 39 I.L.M. at 1299; *see also Garamendi*, 539 U.S. at 406-07.

The United States committed in the Foundation Agreement to file a statement of interest in cases in which Holocaust-era claims against German companies were pending in U.S. courts, declaring that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy" for the resolution of all claims brought "against German companies arising from their involvement in the National Socialist era and World War II." German Foundation Agreement, 39 I.L.M. at 1303; *see also Garamendi*, 539 U.S. at 406. The

Foundation Agreement noted that plaintiffs in pending suits "face[d] numerous legal hurdles, including, without limitation, justiciability, international comity, statutes of limitation, jurisdictional issues, forum non conveniens, difficulties of proof, and certification of a class of heirs." 39 I.L.M. at 1304. The Agreement and statements of interest filed by the United States in conformity with that Agreement stated that they did not take a position on the legal contentions of the parties on those issues. *Id*. The Agreement further stated that "[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal," but it also stated that United States policy interests "favor dismissal on any valid legal ground." *Id.*

Shortly after entering into its agreement with the German government, the United States entered into two similar agreements with Austria. *See* Agreement Between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation," Oct. 24, 2000, 40 I.L.M. 523 [hereinafter Austrian Fund Agreement]; Agreement Relating to the Agreement of October 24, 2000, Concerning the Austrian Fund Reconciliation, Peace and Cooperation," U.S.-Austria, Jan. 23, 2001, 2001 WL 935261. Like the German agreement, the Austrian agreements allocated funds to cover (among other things) insurance claims against Austrian insurance companies, providing that such claims would be handled through Austrian entities that would largely follow ICHEIC procedures. Additionally, the United States pledged that if an Austrian insurance company were sued in U.S. courts over its Holocaust-era policies, the United States would file a statement of interest recommending that the suit be dismissed on any valid legal ground but also stating that the United States did not suggest that its foreign policy interests concerning the Austrian agreements

in themselves provide an independent legal ground for dismissal. Austrian Fund Agreement, 40 I.L.M. at 525, 528-29. The United States also concluded an agreement with France (though the agreement did not address insurance claims). The United States did not conclude any agreement with Italy.

C. The *Garamendi* Decision.

In *Garamendi,* the Supreme Court considered a constitutional challenge to a provision of California law that required each insurance company doing business in the State to publicly disclose detailed information concerning Nazi-era European policies issued by the company or its affiliates. The United States, as amicus curiae, urged the Court to invalidate the California statute.[3] The Supreme Court held that the statute impermissibly intruded into the conduct of U.S. foreign policy. The Court pointed to the history of negotiations over the German Foundation Agreement and Austrian Fund Agreement as evidence of a "consistent Presidential foreign policy * * * to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." *Garamendi*, 539 U.S. at 421. "As for insurance claims in particular," the Court continued, "the national position, expressed unmistakably in the

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[3] The United States noted that the Supreme Court "has struck down state laws that engaged a State in matters affecting the Nation's external affairs 'even in [the] absence of a treaty' or an Act of Congress as inconsistent with the Constitution's assignment to the national government of the authority to conduct foreign relations or, in the commercial area, as inconsistent with the Foreign Commerce Clause." Brief for the United States as Amicus Curiae Supporting Petitioners at 12, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (No. 02-722) [hereinafter U.S. *Garamendi* Br.] (quoting *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968)). The United States thus urged that HVIRA was unconstitutional as an "intru[sion] into the field of foreign relations," as underscored by "[t]he conflict between the means chosen by the United States and by California to resolve Holocaust victims' insurance claims" in particular. *Id.* at 12-13. The United States further observed that HVIRA constituted "extraterritorial regulation" in violation of the Commerce Clause and Due Process Clause of the Fourteenth Amendment, both of which "prohibit a State from regulating activity outside its borders." *Id.* at 21.

executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC to develop acceptable claim procedures, including procedures governing disclosure of policy information." *Id.* The Court held that the disclosure provisions of California law were preempted by federal law because they "interfere[] with the foreign policy of the Executive Branch, as expressed principally in the executive agreements with Germany, Austria, and France." *Id.* at 413.

The Court explained that the executive agreements were not themselves preemptive; instead, the state statute was preempted because it conflicted with the federal foreign policy embodied and reflected in those agreements. *Id.* at 415-417, 420-22. Thus, the Court described the Austrian and German agreements as "exemplars" of the United States' foreign policy, but it also quoted and relied on various statements by executive branch officials, including statements by Deputy Treasury Secretary Stuart Eizenstat and others, setting out the position of the United States. These statements declared that ICHEIC "should be considered the exclusive remedy for resolving insurance claims from the World War II era" and that "a company's participation in the ICHEIC should give it a 'safe haven' from sanctions, subpoenas, and hearings relative to the Holocaust period." *Id.* at 422 (internal quotation marks omitted) (quoting Eizenstat Senate Testimony at 23, and *Restitution of Holocaust Assets: Hearing Before the H. Comm. on Banking and Fin. Servs.*, 106th Cong. 173 (2000) (statement of Stuart Eizenstat)) .

Consistent with the Supreme Court's explanation that U.S. foreign policy (and not any particular executive agreement) had preemptive force in *Garamendi*, the Supreme Court's decision in *Garamendi* made no distinctions between the insurance companies from Germany and Austria challenging the state statute, and Generali, which also was a petitioner in the

Garamendi litigation, even though, as discussed, the United States had entered into executive agreements with Germany and Austria, but not with Italy. The brief of the United States as amicus curiae likewise drew no such distinctions among the petitioners. *See generally* U.S. *Garamendi Br.*; *see also id.* at 15 (stating that application of the state statute to ICHEIC participants "undermines the United States' ability to persuade foreign governments and foreign companies to participate voluntarily in organizations such as ICHEIC"). And, as in *Garamendi*, the pertinent U.S. foreign policy interest is not diminished, for purposes of this case, by the absence of an executive agreement with Italy.

II. United States Foreign Policy Is Not Altered by the Conclusion of the ICHEIC Process.

That ICHEIC has now concluded its operations does not alter the foreign policy of the United States. It was never the foreign policy of the United States that claims should merely be held in abeyance pending conclusion of the ICHEIC process. The policy, as noted, was to encourage all insurance claims to be brought before ICHEIC, thereby promoting not only expeditious and fair resolution of such claims, but also closure for European companies. The obligations of the executive agreements with Germany and Austria still apply, and, as State Department officials have noted, it would undermine future efforts to secure voluntary compensation agreements if ICHEIC participants became subject to litigation as soon as ICHEIC had concluded. *See The Holocaust Insurance Accountability Act of 2007 (H.R. 1746): Holocaust Era Insurance Restitution After ICHEIC, the International Commission on Holocaust Era Insurance Claims*, *Hearing Before the H. Comm. On Fin. Servs.*, 110th Cong. 11 (2008) (statement of Amb. J. Christian Kennedy, Special Envoy for Holocaust Issues, U.S. Dept. of State) (explaining that if ICHEIC participants are subjected to post-ICHEIC litigation, the result

could discourage new countries from establishing compensation systems).

Although the ICHEIC process has concluded, the United States continues its efforts to obtain the cooperation of other nations in contributing to new programs that would potentially provide additional compensation to Holocaust survivors. Poland is on the verge of approving new compensation legislation, and the State Department has been working with Romania in the hopes of improving that country's existing program. Additionally, the United States is involved in ongoing discussions with several European governments in an effort to convene a second Holocaust assets conference. (The first such conference, which took place in 1998, helped to create momentum for the agreements concluded in the subsequent years.) This second conference is currently planned to take place in Prague in June 2009, and the United States is hopeful that it will be able to reach agreements with a number of countries from Central and Eastern Europe.[4]

For these reasons, to answer the Court's question, it is contrary to settled United States foreign policy for plaintiffs' claims to be adjudicated in the courts of the United States.[5] The

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[4] In addition to the United States' efforts, the Conference on Jewish Material Claims Against Germany ("Claims Conference"), a key non-governmental organization based in New York, has been involved in negotiating an expansion of German compensation programs. Some of these negotiations have been successful, and the results have inured to the benefit of many Americans. Other negotiations are still ongoing, and it is important to the United States that those efforts not be undermined.

[5] In his supplemental brief, plaintiff Edward David argues that his claim does not conflict with U.S. foreign policy, urging that Generali refused to honor his policy because it believed that the policy had been cancelled sometime before 1936. If the policy had lapsed by that date, David maintains, it could not have been successfully submitted to ICHEIC.

This view of the facts conflicts with the facts as stated in David's Complaint, *see* A-438, and the United States is not in a position to resolve this apparent factual dispute. However, when a lawsuit arises out of an insurance policy that was cancelled before the Holocaust Era (as that term is defined by ICHEIC), adjudication of the claim is not inconsistent with the United States' foreign policy.

United States takes no position, however, on the legal impact of that foreign policy on the Court's disposition of the claims, except with regard to those claims that arise under California's HVIRA or similar state statutes or state-law principles that single out claims involving events in a foreign country for special treatment. *See supra*, pp. 6-7 & n.3. As the Supreme Court held in *Garamendi*, California's HVIRA falls outside an area of traditional state competence, specifically and impermissibly intrudes into the sphere of foreign policy, impedes the accomplishment of national foreign policy objectives, and is thus preempted. *See* 539 U.S. at 418-420, 425-427. Florida's Holocaust Victims Insurance Act (HVIA) parallels the California statute in all material respects, imposing a variety of requirements with regard to Holocaust-era insurance policies on companies seeking to do business in Florida.[6] *See Garamendi*, 539 U.S. at 413 n.6 (noting the similarity between Florida's HVIA and California's HVIRA); *see also Gerling Global Reins. Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) (holding, in accord with the views of the United States, that Florida's HVIA violated due process because the state had insufficient connections to the European insurance contracts and companies that it regulated).[7] Claims under such provisions are foreclosed under *Garamendi*.

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[6] *See* Fla. Stat. § 626.9543(3)(a) (defining a "Holocaust victim" as "any person who lost his or her life or property as a result of discriminatory laws, policies, or actions targeted against discrete groups of persons between 1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, or countries allied with Nazi Germany"); *id.* § 626.9543(5) (imposing special claims handling requirements for insurance claims submitted by Holocaust victims or their beneficiaries); *id.* § 626.9543(6) (imposing special statutes of limitations for claims brought by Holocaust victims or their beneficiaries); *id.* § 626.9543(7) (imposing special disclosure requirements for policies issued to Holocaust victims).

[7] The Brauns Complaint asserts claims under California's HVIRA. *See* Brauns Compl.¶ 45(q), A-248. Plaintiff Weiss asserts claims under Florida's HVIA. *See* Weiss Compl. ¶¶ 123-134, A-339 to A-341.

III. Conclusion

For the foregoing reasons, it would be in the foreign policy interests of the United States that ICHEIC be regarded as the exclusive forum for resolution of insurance claims against companies like Generali that participated in the ICHEIC process. Accordingly, it would be in the foreign policy interests of the United States that such claims not be pursued through the courts. Consistent with the statements of interest filed by the United States in cases covered by the German Foundation Agreement, the United States does not suggest that its foreign policy interests concerning these claims and ICHEIC in themselves furnish an independent basis for dismissal. Similarly, the United States takes no position on the various legal grounds that have been urged in favor of dismissal, except that it is the United States' view that plaintiffs may not rely on Holocaust-specific state statutes such as HVIRA (or state-law principles that similarly single out claims concerning events in a foreign country for special treatment). For the reasons given by the Supreme Court in *Garamendi* and by the United States in its brief in that case, such state law is preempted.

Respectfully submitted,

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I hereby certify that the electronic copy of the letter filed with the Court by electronic mail is identical in all respects except the signature to the hard copy filed with the Court, and that a virus check was performed on the electronic version using the Trend Micro OfficeScan software program, with the result that no viruses were detected.

/s/ Sharon Swingle
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CERTIFICATE OF SERVICE

I hereby certify that, on the 30th day of October 2008, two copies of the foregoing letter brief for amicus curiae the United States of America was served on the following counsel by overnight delivery, postage prepaid:

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